



Signed: May 09, 2005

Leslie Tchaikovsky

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF CALIFORNIA
LESLIE TCHAIKOVSKY
U.S. Bankruptcy Judge

In re

No. 96-47887 TR
Chapter 7

MICHAEL ROBERT BOEHRER, and
JENNIFER LYNN BOEHRER,

Debtors.

MICHAEL ROBERT BOEHRER

A.P. No. 04-4299 AT

Plaintiff,

VS.

ROBERT I. BOEHRER, etc.,

Defendant.

ROBERT I. BOEHRER, etc.,

Counterclaimant,

VS.

WILLIAM BROACH, Chapter 7
Trustee,

Counterdefendant.

MEMORANDUM OF DECISION

In this adversary proceeding, William Broach (the "Trustee"), the chapter 7 trustee in the above-captioned case, seeks authorization to sell certain real property (the "Property") in which the estate claims a half-interest free and clear of the

1 interest of a co-owner. Alternatively, the Trustee seeks to
2 partition the Property under California law. The Trustee filed a
3 motion for summary judgment on the first of these two claims. The
4 co-owner, Robert Boehrer ("Robert"), the father of the above-
5 captioned debtor (the "Debtor"), opposed the motion. For the
6 reasons stated below, the motion for summary judgment will be
7 granted.

8 DISCUSSION

9 A. STANDARDS GOVERNING MOTIONS FOR SUMMARY JUDGMENT

10 Summary judgment is appropriate "if the pleadings,
11 depositions, answers to interrogatories, and admissions on file,
12 together with affidavits, if any, show that there is no genuine
13 issue as to any material fact and that the moving party is
14 entitled to a judgment as a matter of law." Fed. R. Civ. P.
15 56(c). The moving party has the burden of establishing the
16 absence of a genuine issue of material fact. Celotex Corp. v.
17 Catrett, 477 U.S. 317, 323 (1986). If the moving party meets this
18 burden, the nonmoving party must go beyond the pleading and
19 identify facts demonstrating a genuine issue for trial. Id. at
20 324.

21 Summary judgment should be entered against a "party who fails
22 to make a showing sufficient to establish the existence of an
23 element essential to that party's case, and on which that party
24 will bear the burden of proof at trial. Id. at 322. The
25 nonmoving party has a duty to present affirmative evidence in
26 order to defeat a properly supported motion for summary judgment.

1 Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 252 (1986).
2 "[S]ummary judgment will not lie if the dispute about a material
3 fact is 'genuine,' that is, if the evidence is such that a
4 reasonable jury could return a verdict for the nonmoving party."
5 Id. at 248.

6 **B. STATEMENT OF UNDISPUTED FACTS**

7 Prior to 1992, title to the Property was held in equal parts
8 by Robert and the two children of Robert's former wife, Denise and
9 Craig. In 1992, Robert, Denise, and Craig executed a grant deed
10 (the "1992 Grant Deed"), transferring title to the Property in
11 equal parts to Robert and the Debtor, Robert's biological son.
12 The Debtor filed a chapter 7 bankruptcy petition in September
13 1996. He did not list his interest in the Property in his
14 bankruptcy schedules. It is undisputed that, at that time, he
15 held a fifty percent record title interest in the Property. His
16 bankruptcy case was closed in February 2004.

17 In 2004, the Debtor filed an action in state court against
18 Robert, seeking to partition the Property. During the course of
19 discovery, the Debtor's failure to schedule his interest in the
20 Property was revealed. The bankruptcy case was reopened, the
21 action was removed to bankruptcy court, and a claim for sale of
22 the Property pursuant to 11 U.S.C. § 363(h) was added to the
23 complaint (the "Complaint").¹

24
25 ¹If a property interest is duly scheduled and the trustee
26 does not administer it, the property is deemed abandoned to the
debtor when the case is closed. However, if the property
interest is not scheduled, it remains property of the estate

1 Between the filing of the Debtor's bankruptcy case in 1992 and
2 the reopening of the case, two additional deeds were executed and
3 recorded affecting title to the Property. In 1999, the Debtor
4 executed a deed (the "1999 Grant Deed"), transferring his interest
5 in the Property to Robert and Denise. In 2002, Denise executed a
6 deed (the "2002 Grant Deed"), transferring her interest in the
7 Property to the Debtor.²

8 **C. ARGUMENT**

9 The Trustee contends that, in 1992, when the bankruptcy case
10 was filed, the Debtor owned a fifty percent interest in the
11 Property as reflected in the way legal title was held. The
12 Trustee bases his contention on two legal theories. First, he
13 notes that, under California law, there is a presumption that
14 equitable ownership in property is consistent with the way in
15 which legal title is held. This presumption can only be overcome
16 by clear and convincing evidence to the contrary. Cal. Evidence

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21 despite the fact that the case has been closed. 11 U.S.C. §
22 554(c),(d).

23 ²In his deposition, excerpts of which were provided by
24 Robert, the Debtor stated that the purpose of this transfer was
25 to facilitate a refinance of the secured debt on the Property.
26 The Debtor's bad credit history was purportedly interfering with
the refinance. Since any interest of the Debtor in the Property
was still property of his chapter 7 estate at that time, the
purported transfer of that interest by the Debtor pursuant to
the 1999 Grant Deed was void. See 11 U.S.C. § 362(a)(3); In re
Donpedro, 2004 WL 3187072, **2-3 (Bankr. N.D. Cal.).

1 Code § 662; Schindler v. Schindler, 126 Cal. App. 2d 597, 601-02
2 (1954).³

3 Second, the Trustee asserts that, pursuant to 11 U.S.C. §
4 544(a)(3), he may assert the rights of a bona fide purchaser of
5 real property as of the petition date to avoid any unrecorded
6 interest of Robert in the remaining portion of the Property. This
7 Memorandum only addresses the first of these two arguments.⁴

8 To the contrary, Robert argues that, in 1996, when the
9 Debtor's bankruptcy case was filed, the Debtor held bare legal
10 title to fifty percent of the Property and that he had no
11 equitable interest in the Property. First, Robert contends that
12 he had an agreement with all three children that, regardless of
13 how legal title was held, they would only acquire an equitable
14 interest in the Property by remaining on the Property and
15 assisting him financially. They would lose any equitable interest
16 in the Property if they moved out.⁵

18 ³See Weaver v. Weaver, 224 Cal. App. 3d 478, 487 (1990),
19 quoting from Sheean v. Sullivan, 126 Cal. 189, 193 (1899),
20 (describing the "clear and convincing" standard as requiring
21 evidence that is "'sufficiently strong to command the
unhesitating assent of every reasonable mind.'")

22 ⁴Because the Trustee had not pleaded an avoidance claim,
23 the Court agreed to address the Trustee's argument under
24 California law first. If this argument was unsuccessful, the
25 Court would then give the Trustee an opportunity to amend the
Complaint to add an avoidance claim. Because the Court
concludes that the Trustee is entitled to prevail on his first
legal theory, this will not be necessary.

26 ⁵The Debtor's deposition testimony supports this contention
to some extent. He testified that, from the time he, Denise,

1 Second, Robert contends that the Debtor "cashed out" any
2 equitable interest in the Property in 1995, when he received
3 approximately \$53,000 in loan proceeds. Robert claims that the
4 Debtor used the funds to purchase a residence for his family.⁶
5 This version of the facts is supported by Robert's declaration
6 filed in support of his opposition to the motion and by his
7 answers to interrogatories. These two theories are logically
8 inconsistent. If Robert believed that the Debtor had no equitable
9 interest in the Property, it would make no sense for him to give
10 the Debtor \$53,000 in loan proceeds for a debt that would encumber
11 the Property.

12 **D. DECISION**

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14
15 and Craig were "little kids," Robert told them that they each
16 would receive 5 acres of the Property: i.e., approximately one-
17 quarter of the Property. As a result, he took their paychecks
18 while they lived on the Property. For some reason, neither
19 party has established when Denise and Craig were put on title to
the Property although the Trustee asserted in his reply brief
(page 3, line 10) that, in 1992, Denise and Craig had been on
title for ten years.

20 ⁶In his declaration, the Debtor stated that he did not
21 receive any portion of the loan proceeds in 1995 and that
22 Robert's version of the facts made no sense since the Debtor
23 purchased his home in 1992 or 1993. In response, Robert stated
24 that he had actually loaned the Debtor \$20,000 at the time the
25 home was purchased, that he loaned him an additional \$30,000 in
26 1995, and that the \$53,000 represented a consolidation of the
two loans. In his deposition testimony, excerpts of which were
provided by Robert, the Debtor admitted receiving some money
from Robert at the time he purchased his residence. However, he
stated that these funds were gifted to him, in recognition that
Denise had received substantial financial support for her higher
education.

1 The evidence summarized above clearly establishes a genuine
2 issue of material fact with regard to the ownership of the
3 Property. Absent the presumption created by Cal. Evidence Code §
4 662, the Court would deny the Trustee's motion and set the matter
5 for trial unless the proceeding could be resolved without trial
6 pursuant to the Trustee's as yet unpleaded avoidance theory.
7 However, the presumption created by Cal. Evidence Code § 662
8 places a heavy burden of proof on Robert which the evidence
9 presented does not come close to meeting. Consequently, the
10 motion for summary judgment will be granted.

11 Counsel for the Trustee is directed to submit a proposed form
12 of order and judgment in accordance with this decision. The
13 judgment form should address the disposition of the partition
14 claim.

15 END OF DOCUMENT
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